C/015/032 Incoming
cc: Dana
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DIV. OF OIL, GAS & MINING

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December 20, 2012

Ms. Dana Dean
Associate Director, Mining
Utah Division of Oil, Gas and Mining
1594 West North Temple
Salt Lake City, Utah 84116

RE: Office of Surface Mining Reclamation and Enforcement ("OSM") Ten Day Notice No. X12-140-933-001, Crandall Canyon Mine Performance Bond

Dear Ms. Dean:

On behalf of Genwal Resources, Inc. ("**Genwal**"), this letter responds to the Ten Day Notice ("**TDN**") issued by the Office of Surface Mining ("**OSM**") to the Utah Division of Oil, Gas and Mining ("**Division**") on December 7, 2012. The TDN pertains to the adequacy of the $720,000 performance bond posted by Genwal with the Division to secure the cost of mine water treatment at the Crandall Canyon Mine. Contrary to the allegations set forth in the TDN, the State of Utah has taken appropriate action to address this matter. Genwal requests that the Division seek review of OSM's informal decision and request that the TDN be vacated.

As you know, this is not the first time the Division or the Board of Oil, Gas and Mining ("**Board**") has considered the adequacy of the Genwal performance bond. Over three years ago, the Division issued Division Order 9A, subsequently modified by Division Order 10-A ("**DO 10-A**"), requiring Genwal to post a performance bond sufficient to cover the costs of funding long-term treatment of water discharged from the mine. Genwal was successful in challenging the perpetual funding requirement of DO 10-A before the Board. After taking substantial evidence and considering the issue over five separate hearing dates, the Board determined that a perpetual treatment bond was unnecessary as discharges of water with elevated iron concentrations was likely to continue for no more than three years. *See* Board Findings of Fact, Conclusions of Law and Order, p. 27, Cause No. C/015/0032 F. The Board required Genwal to post a bond of $720,000 for the payment of three years of annual water treatment costs. Order, p. 30. The bond is to be held by the State until iron concentrations of untreated discharge water meet water quality standards. *Id.* Further, the Board required the Division to review water monitoring data at least annually and retained jurisdiction to allow the Division or Genwal to petition for a bond adjustment, based on the monitoring data. Order, p. 30.

Under 30 C.F.R. § 842.11(b)(1)(ii)(B), a TDN will be upheld by OSM unless the state regulatory authority shows that the state has in fact taken appropriate action to cause the alleged violation to be corrected or shows that "good cause" exists for the decision not to take corrective action. Here, the Board's careful review of the adequacy of the performance bond, consideration of the substantial evidence submitted by Genwal and the Division and retention of jurisdiction to adjust the bond, places the present case squarely within the "good cause" exception found at 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv).

Under this exception, the state agency is excused from requiring the corrective action ordered by OSM if "good cause" is found. "Good cause" exists when the state agency's authority to act is precluded by an order from an administrative body. Specifically, as relevant here, the "good cause" exception provides in pertinent part:

> (2) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so.
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> ***
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> (4) Good cause includes:
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> (i) Under the State program, the possible violation does not exist; [or]
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> ***
>
> (iv) The State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing . . . .

30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv). Thus, an order from OSM will not stand against a state agency when no violation has occurred under the approved state program or a state administrative body has issued an order precluding the state agency from acting on the alleged violation after finding that no violation has occurred. This is precisely what occurred when the Board considered DO 10-A and amended it so as to require performance bonding for water treatment at a rate sufficient to cover the costs for a three year period. The Division Order (DO 10-A) did not arise in the context of a violation and Genwal's timely compliance with the Board Order by posting the required $720,000 bond prevented the need for enforcement action.

The Board took voluminous evidence regarding the likely duration of elevated iron concentrations in water discharges from the mine, including expert reports submitted on behalf of Genwal and the Division. Over the span of seven pages in its written decision, the Board

compared the data contained in each report, ultimately finding the expert opinions rendered by Erik Petersen, Genwal's expert hydrologist, more persuasive than those of Kevin Lundmark, the Division's expert. After careful evaluation of the evidence and consideration of Mr. Petersen and Mr. Lundmark's reports, the Board concluded that discharges of contaminated water were likely not to continue for a period of more than three years, thus rendering the Division's order requiring the posting of a perpetual bond unnecessary. As such, the Board vacated the Division's perpetual bond requirement and instead ordered that Genwal post a bond in the amount of $720,000.00, covering annual water treatment costs of $240,000.00 per year for a three year period.

The present case is precisely the kind of situation that the "good cause" exception is intended to address. The Board considered DO 10-A and found the order's perpetual bond requirement unnecessary under Utah's program. Thus, the Board modified the bonding requirement to provide for protection for the time period it determined was called for. This did not result in a finding that a violation of the state program had occurred, but rather a determination that under the state program as written perpetual bonding was not *required.* Therefore, the Division is precluded from taking action on the violation alleged by OSM in the TDN by virtue of the Board's decision, fitting the present case squarely within the good faith exception. *See Elk Run Coal Co. v. Babbitt,* 919 F. Supp. 225 (S.D.W. Va. 1996) (holding that West Virginia Department of Environmental Protection's reliance on West Virginia Surface Mine Board's decision that a mining company had not caused alleged damage to a structure made after an evidentiary hearing constituted "good cause" for taking no further action and precluding OSM oversight); *Al Hamilton Contracting Co. v. Kempthorne*, 639 F.Supp.2d 597 (W.D. Pa. 2009) (Final decision of Pennsylvania Environmental Hearing Board determining that mine operator was not liable for acid mine drainage discharges and vacating a compliance order of the Pennsylvania State Department of Environmental Resources ("**PADER**") was "good cause" for PADER not to order the operator to treat the discharges).

OSM ignores the precise nature of the Board's decision in its December 7, 2012 cover letter accompanying the TDN. In that letter, OSM states without authority or support that the "good faith" exception is inapplicable because the Board found that a "violation of R645-301-830.200 existed." R645-301-830.200 provides "[t]he amount of the bond will be sufficient to assure the completion of the reclamation plan if the work has to be performed by the Division in the event of forfeiture, and in no case will the total bond initially posted for the entire area under one permit be less than $10,000." The Board's decision did not find that the bond was not "sufficient to assure the completion of the reclamation plan if the work has to be performed by the Division in the event of forfeiture" or was less than $10,000. Instead, the Board's decision found that the bond amount set by the Board was greater than that required by R645-301-830. This conclusion is in no way a finding that a violation of R645-301-830.200 occurred. As such, there is no basis for OSM's conclusory statement that the good faith exception is inapplicable.

For these reasons, Genwal believes that OSM issued the TDN in error and that the Division should be relieved from compliance with the action ordered in the TDN under the "good cause" exception. The Board has fully and appropriately considered all relevant evidence related to the likely duration of contaminated water discharges from the mine and has determined that R645-301-830.200 requires only that a bond be posted for three years of treatment costs. Genwal requests that the Division respect the Board's decision in this regard and urges the Division to seek informal review of the TDN pursuant to 30 C.F.R. § 842.11(b)(1)(iii).

Very truly yours,

Denise A. Dragoo

DD:jmc
cc: Kenneth Walker, Chief, OSM Denver Field Division
John R. Baza, Division Director
James T. Jensen, Board Chairman
Michael Johnson, Esq.
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